Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	
Implementation of the Local Competition provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") respectfully submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") in the above-referenced docket.

I. BACKGROUND

On February 26, 1999, the FCC released a declaratory ruling finding that traffic bound to an Internet service provider ("ISP") is "largely interstate" and subject to federal jurisdiction. Order, ¶ 27. Over twenty states, including California, have treated such traffic as local, and subject to the payment of reciprocal compensation by the local exchange carrier ("LEC") to a competitive local carrier ("CLEC") whose lines the ISP has purchased.

Under Section 251(b)(5) of the Telecommunications Act of 1996 ("1996 Telecom Act"), only traffic that is deemed local is subject to the payment of reciprocal compensation. Carriers that transport interstate traffic ordinarily are compensated through access charges, but federal policy prohibits LECs and CLECs from imposing access charges on ISPs. Thus, the CLEC cannot collect compensation from ISPs for delivering traffic to them, and, according to the FCC's declaratory ruling, the CLEC cannot collect reciprocal compensation for terminating local traffic under Section 251(b)(5) of the 1996 Telecom Act. Order, ¶ 26, n.87. The FCC proposes to fill this void by suggesting proposals for inter-carrier compensation that it has noticed for comment. In the meantime, the FCC has permitted states which have treated ISP-bound traffic as local under interconnection agreements to continue to require LECs to compensate CLECs under contractual principles or other legal or equitable considerations. Order, ¶ 27.

The FCC has also solicited comment on whether ISP-bound traffic is jurisdictionally separable, and the impact of its treatment of such traffic on jurisdictional cost separations. The FCC further seeks comment on how the "pick and choose" rule should be limited so that successive CLECs cannot extend terms of interconnection agreements for an indeterminate period of time.

II. FCC INTER-CARRIER COMPENSATION PROPOSALS

The FCC suggests two proposals for inter-carrier compensation. Under its preferred proposal, the FCC would base inter-carrier compensation rates on commercial negotiations undertaken as part of the broader negotiations between LECs and CLECs. In the event of disagreement, inter-carrier compensation would be subject to state arbitration under Sections 251 and 252 of the 1996 Telecom Act, just as other disputed interconnection issues are so subject.

Under its alternate proposal, the FCC would adopt a set of federal rules governing-inter-carrier compensation. However, unlike other interconnection disputes resolved through state arbitration, disputes on inter-carrier compensation would be resolved by arbitration by the Common Carrier Bureau of the FCC, or a third party arbitrator.

California supports the FCC's preferred proposal to continue to rely on commercial negotiations, and if necessary, state arbitrations of disputed issues, to determine reasonable inter-carrier compensation rates for ISP-bound traffic. California has developed a workable and fair process for arbitrating all disputed interconnection issues. California perceives no benefit in singling out a particular disputed issue – inter-carrier compensation for ISP-bound traffic – for arbitration by a different arbitrator. In fact, there are serious shortcomings to this proposal. Specifically, treating inter-carrier compensation as severable from other interconnection issues would require the coordination of multiple arbitrators over a single interconnection agreement. Not only would such coordination prove administratively cumbersome both to the parties and arbitrators, but it would also inevitably lead to delay in the final review and approval of these agreements by the state regulatory commission and the FCC. Delay in review and approval in turn would directly translate into delay in implementation, and ultimately delay in the entry of additional competitors into the local telecommunications market. Such result is inconsistent with the purpose of the 1996 Telecom Act.

California therefore urges the FCC to continue to rely on commercial negotiations of all interconnection issues, subject to dispute resolution by state commissions. Compensation governing all ISP-bound traffic, both interstate and intrastate, should remain subject to this model. While there is record evidence in the FCC's related docket, In the Matter of GTE Telephone Operating Companies, CC Docket No. 98-79, indicating that ISP-bound traffic can be segregated, and that the majority of such traffic is intrastate, California believes that no useful purpose would be served by segregating the interstate portion of such traffic.[1] Until such time as record evidence establishes whether ISP-bound traffic can feasibly be segregated, the FCC should continue to treat all ISP-bound traffic as intrastate.

California also believes that it is unnecessary for the FCC to adopt a set of federal rules that specifically sets inter-carrier compensation rates. The FCC has wisely chosen not to adopt specific rate-setting proposals governing other interconnection issues. Instead, the FCC has left the resolution of such rates to commercial negotiation, and if

[1] See Reply Comments of Hyperion Telecommunications, Inc. on Petitions for Reconsideration, containing a study indicating that less than 10 percent of total traffic to ISPs is interstate.

necessary, state arbitration. This approach is consistent with the policies underlying Sections 251 and 252 of the 1996 Telecom Act. The same approach should be adopted with respect to inter-carrier compensation rates.

III. JURISDICTIONAL SEPARATIONS

In its NPRM, the FCC recognizes that its designation of ISP-bound traffic as interstate should not be permitted to result in a mismatch of the costs and revenues of such traffic between state and federal jurisdictions under cost allocation procedures. Order,¶ 36. Currently, ISPs purchase access lines from CLECs or LECs out of intrastate business tariffs rather than interstate access tariffs. Customers seeking to reach ISPs also purchase access from intrastate tariffs. The FCC proposes to continue this approach. The FCC also proposes to assign both the costs and revenues of ISP-bound traffic to the intrastate jurisdiction.

As a matter of policy, California agrees that cost allocation methods must ensure that there is no mismatch of costs and revenues of ISP-bound traffic between state and federal jurisdictions. It appears, however, that such a mismatch may have occurred with GTE's jurisdictional allocation of ISP-bound traffic. As set forth in the petition filed by the National Association of Regulatory Utility Commissioners ("NARUC") in CC Docket No. 98-79, GTE appears to have assigned 75 percent of the costs, but only 25 percent of the revenues, associated with its access lines for ISP-bound traffic to the state jurisdiction.[2] Cost allocation procedures must preclude such a mismatch.

IV. PICK AND CHOOSE PROPOSAL

Under Section 252(i) of the 1996 Telecom Act, as implemented by the FCC rules, successive CLECs may "pick and choose" the terms and conditions governing an interconnection, service or network element provided under a previously-approved agreement between an incumbent LEC and another CLEC. The FCC points out that the ability to "pick and choose" should not subject an incumbent LEC to obligations in previously-approved agreements for an indeterminate length of time.

California agrees that incumbent LECs should not be bound, potentially into perpetuity, to obligations negotiated in previously-expired interconnection agreements. However, successive CLECs should be allowed to pick and choose terms and conditions from other approved interconnection agreements. California therefore proposes that successive CLECs be allowed to pick and choose any term and condition approved in an interconnection agreement that has not yet expired. For example, if one year remains of a state-approved three-year interconnection agreement between an incumbent LEC and CLEC "A", any successive CLEC (i.e., CLEC "B", "C", etc.) would have one year during which it could select any of the terms and conditions contained in the approved agreement

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2 Request for Clarification And/Or Reconsideration of the National Association of Regulatory Utility Commissioners, In the Matter of GTE Telephone Operating Cos., CC Docket No. 98-79 (filed November 30, 1998).

of incumbent LEC and CLEC A. The selected term could then be incorporated into the agreement between the incumbent LEC and CLEC B.[3] However, successive CLECs would not be able to pick and choose terms and conditions from CLEC A's agreement after the agreement's expiration. At the same time, to the extent that CLEC B timely selects a term from CLEC A's agreement, and negotiates new terms with the incumbent LEC, CLEC C could choose those terms during the life of CLEC B's agreement. CLEC C, however, could not choose terms from CLEC B's agreement that CLEC B had chosen from CLEC A's now expired agreement. [4]

California believes that this type of proposal fairly balances the interests of incumbent LECs and CLECs, consistent with the policies underlying the federal pick and choose rule.

V. CONCLUSION

California respectfully urges the FCC to adopt its tentative conclusion to continue to rely on commercial negotiations, subject to state arbitration under Sections 251 and 252 of the 1996 Telecom Act, to resolve all interconnection issues, including inter-carrier compensation for ISP-bound traffic. This approach not only is fully consistent with the purpose of the Telecom Act to rely on market forces to promote interconnection and competition, but it is also administratively and economically efficient.

[3] The duration of the agreement between the incumbent LEC and CLEC B would be whatever length was negotiated.

[4] The terms and conditions of agreements could each contain an expiration date, identifying which terms and conditions could be selected by a successive CLEC.

In addition, California urges the FCC to ensure that the allocation of costs and revenues of ISP-bound traffic is not mismatched by jurisdiction. Finally, California urges the adoption of a pick and choose rule, such as that proposed by California, that fairly balances the interests of both incumbent LECs and CLECs.

Respectfully submitted,

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